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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1198

NOLDE BROTHERS, INCORPORATED,
Petitioner,

vs.

LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 530 F 2d 548, 91 LRRM 2570. (P.A. 1-22)[1] The opinion of the District Court is reported at 382 F Supp 1354, 87 LRRM 2646. (P.A. 24-33)

JURISDICTION

The judgment of the Court of Appeals was entered October 23, 1975 (P.A. 1); the timely petition for re-

1. The designation "P.A....." refers to pages in the appendix in the petition for writ of certiorari; the designation "A" refers to pages in the single appendix before this Court.

hearing and suggestion for rehearing en banc was denied on November 26, 1975. (P.A. 23) The petition for writ of certiorari, filed on February 21, 1976, was granted on May 19, 1976. Jurisdiction of this Court rests on 28 USC §1254(1).

QUESTION PRESENTED

Is an employer required to arbitrate a dispute between the employer and a union where the dispute did not arise until after the union terminated the parties' agreement to arbitrate, notwithstanding the United States Supreme Court's ruling that an obligation to arbitrate a labor dispute arises solely from a contract between the parties and not by operation of law?

STATEMENT OF THE CASE

Nolde Brothers, Incorporated (the Company) and Local No. 358 Bakery & Confectionery Workers International Union (the Union) were parties to a collective bargaining contract entered into on July 28, 1970, covering certain employees of the Company's Norfolk, Virginia bakery. (A. 16, 19-37) Included in the contract was a severance pay provision. (A. 3, 31-32) The contract, which provided for a mandatory grievance-arbitration procedure[2] (A. 4, 32-33), was to remain in

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2. "Article XII. Grievances and Arbitration.

Section 1. All grievances shall be first taken up between the Plant Management and the Shop Steward. If these parties shall be unable to settle the grievance, then the Business Agent of the Union shall be called in, in an attempt to arrive at a settlement of the grievance. If these parties are unable to settle the grievance, the dispute will be settled as called for in Sections 2 and 3 of this Article.

Section 2. In the event that any grievance cannot be satisfactorily adjusted by the procedure outlined above, either of the

full force and effect until July 21, 1973 and thereafter until a new agreement had been reached and executed, or until either the Union or the Company terminated or cancelled the agreement by giving seven days' written notice to the other. (A. 16, 35)[3]

On May 16, 1973 the Union advised the Company pursuant to §8(d) of the National Labor Relations Act (29 USC §158[d]) that it wished to negotiate certain changes in the existing contract. (A. 16, 38) The parties commenced bargaining and negotiated for approximately three months. (A. 16, 39) At the second bargaining session, the Company offered to extend the contract for six months with some increases in the

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(Footnote Continued)

parties hereto may demand arbitration and shall give written notice to the other party of its desire to arbitrate. No individual employee shall have the right to invoke arbitration without the written consent of the Union. The Arbitration Board shall consist of three (3) persons, one selected by the Company and one selected by the Union. The two persons selected shall agree upon a third person who shall act as Chairman of the Arbitration Board.

Section 3. The decision or award of the Arbitration Board, or a majority thereof, shall be final and binding on both parties. If the third party to arbitration is not selected in ten (10) days from receipt of notice, the Director of the U. S. Conciliation Service shall be requested to make the appointment. The expense of the neutral arbitrator shall be borne equally by the parties.

Section 4. Pending negotiations or during arbitration there shall be no strikes, lock-outs, boycotts, or any stoppages of work."

3. Article XIX of the contract provided as follows:

"This Agreement shall be in full force and effect from July 19, 1970, until and including July 21, 1973, and thereafter, until a new Agreement (the terms of which shall be retroactive to the above given date) has been consummated and signed, or this Agreement, after the expiration date, has upon seven days written notice been cancelled or terminated by the Local Union with the sanction of the Bakery and Confectionery Workers' International Union of America, AFL-CIO, or by the Employer."

fringe benefits provided in the contract but the Union rejected this offer. (A. 17) On August 20, 1973 the Union wrote the following letter to the Company:

> "This is to notify you that the Bakery and Confectionery Workers International Union of America, Local No. 358, hereby gives seven days notice, in accordance with Article XIX of its current labor agreement, to cancel its current labor agreement covering the Company's Norfolk, Virginia Plant." (A. 41-42)

Thus, as of August 27, 1973 the contract between the parties had been cancelled and terminated as provided in Article XIX.

At a bargaining session held August 31, 1973, the Union rejected the Company's last offer and, acknowledging that the employees were working without a contract, stated that the Union would strike unless the Company agreed to the Union's proposals. (A. 17-18) After consideration of the Union's position, the Company advised the Union that it would permanently close its Norfolk bakery and did permanently cease operations at that bakery on August 31, 1973. (A. 18, 44)

Subsequent to the plant closing and after the Union's termination of the contract, the Union made a demand for severance pay and further demanded that the Company arbitrate the issue as to whether the released employees were entitled to severance pay. (A. 18-19) The Company refused the Union's claim for severance pay (A. 7) and refused to arbitrate the issue of whether the employees were entitled to severance pay. (A. 8, 19) The Company's position was that both the right to severance pay and the duty to arbitrate

were solely creatures of the contract which the Union had terminated and cancelled. (A. 7, 8, 12, 19)

The Union then instituted this action in the District Court for an order compelling arbitration of the severance pay issue which arose after the Union terminated the agreement to arbitrate or, in the alternative, for an order awarding severance pay to the released employees. (A. 1, 2-6) On the parties' cross motions for summary judgment, the District Court held that the Union's voluntary termination of its collective bargaining contract (including the arbitration agreement) had terminated the Company's duty to arbitrate any grievance arising thereafter and had extinguished any obligation to pay severance pay. (A. 2, 46; P.A. 24-33)

After timely appeal by the Union, the Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and held that the severance pay dispute should be submitted to arbitration even though the parties' agreement to arbitrate had expired. (P.A. 1-22) Each member of the three-judge panel wrote a separate opinion, one judge dissenting in part. (P.A. 1-22) Circuit Judge Craven ruled that the employees' right to severance pay depended upon the intent of the parties and that "[a]ny question of the intent behind a collective bargaining term must be referred to arbitration. . . ." (P.A. 5) In his opinion, Judge Craven took the position that although there was no agreement to arbitrate "either when the dispute arose or when suit [to compel arbitration] was filed" the Company could be compelled to arbitrate the severance pay grievance because in the terminated labor contract the Company "literally agreed to arbitrate any issue of its obligation for severance pay." (P.A. 8-10)

While Judge Craven recognized that certain disputes arising after the termination of the contract were not arbitrable (P.A. 12) and that the Company cannot have been considered to agree to arbitrate certain disputes "for all time", Judge Craven concluded that the severance pay grievance involved an "accrued" right and, hence, the "best way" to resolve the dispute and the result serving "the most basic policy of our labor laws" was to compel the Company to arbitrate. (P.A. 12-13) Judge Aldrich concurred with Judge Craven. (P.A. 13-14) Judge Widener concurred in the order to arbitrate but dissented to the extent that the order precluded the Company from submitting the question of its duty to arbitrate to the arbitrator. (P.A. 14-22)

SUMMARY OF ARGUMENT

The Union and the Company were parties to a labor contract which included a provision for the arbitration of disputes. The Union terminated the contract in anticipation of a strike against the Company. Subsequent to the Union's termination of the contract, a dispute arose between the parties concerning events occurring after the termination of the contract, and the Union is attempting to compel the Company to submit the dispute to arbitration even though at the time the events occurred the parties were not bound by an agreement to arbitrate.

Frequently characterized as a "creature of contract", arbitration is purely a consensual process and the duty to arbitrate only extends to disputes arising when the parties are contractually bound to arbitrate. No obligation to arbitrate a dispute arises by operation of law. Because the dispute between the Company and

the Union arose when there was no agreement to arbitrate disputes between them, the Company cannot be compelled to arbitrate the dispute.

Federal labor policy established by Congress is designed to insure that collective bargaining occurs when a majority of employees in an appropriate unit desire collective bargaining. But federal labor policy also strictly prohibits the courts or the National Labor Relations Board (the Labor Board) from imposing terms of agreement on the parties. To compel the Company to arbitrate a grievance which arose when the Company had not consented to arbitration violates federal labor policy.

The Labor Board which in the Congressional legislative scheme is the primary regulator of the collective bargaining process has held that an employer has no duty to arbitrate grievances arising during the hiatus after the expiration of one labor contract and prior to the execution of another labor contract. The Labor Board's interpretation of federal labor policy cannot be disregarded in cases arising under §301.

The Fourth Circuit's opinion violated federal labor policy by effectively rewriting the parties' contract to provide terms and conditions to which the parties had not agreed. The parties had agreed that their entire contract could be terminated but the Fourth Circuit imposed an exception to that agreement by holding that their agreement to arbitrate could not be terminated. Thus, the Fourth Circuit expanded the parties' contract. The error of the Fourth Circuit's analysis is demonstrated by the fact that, in other respects, the Fourth Circuit effectively narrowed the scope of the parties' contract as follows: The contract provided that

"all grievances" were to be arbitrated; yet, the Fourth Circuit held that after the contract was terminated, the parties had to arbitrate only some grievances. While this Court has held that the extent of the duty to arbitrate must be determined only on the basis of the parties' contract, the Fourth Circuit's opinion regarding the duration of the Company's obligation to arbitrate is based on the Court's characterization of the nature of the right involved in the grievance and the nature of the dispute between the parties.

ARGUMENT

I. The Company Cannot Be Compelled to Arbitrate the Grievance Because the Union and the Company Were Not Subject to an Agreement to Arbitrate When the Facts Giving Rise to the Grievance Occurred

There is no dispute of material fact in this case; the Union is attempting to compel the Company to arbitrate a grievance based upon events occurring after the Union terminated the parties' labor contract, including the provisions therein requiring the arbitration of grievances. As the Fourth Circuit stated in its majority opinion below, "there was [no binding contract with an arbitration clause in existence] . . . either when the dispute arose or when suit was filed." (P.A. 8) The Company submits that neither labor nor management can be compelled to arbitrate a grievance unless at the time the grievance arose the party was bound by a contract in which it consents to arbitrate grievances.

The most fundamental characteristic of arbitration is that it is a result of the agreement of the parties.

"The law compels a party to submit his grievance to arbitration only if he has consented to do so." *Gateway Coal Co.* v. *United Mine Workers*, 414 US 368, 374 (1974). A collective bargaining relationship can exist for decades but unless and until the parties mutually agree to submit grievances to arbitration, they cannot be compelled to arbitrate anything. As Justice Brennan stated in his concurring opinion in *Steelworkers* v. *American Manufacturing Company*, 363 US 564, 570 (1960):

> "The arbitration promise is itself a contract. The parties are free to make their promise as broad or as narrow as they wish, for there is no compulsion in law requiring them to include any such promises in their agreement."

Because the duty to arbitrate is a "matter of contract" (*Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 US 574, 582 [1960]), this Court has held that before any party can be required to arbitrate any dispute, there must first be a finding that "the parties are subject to an agreement to arbitrate." *Operating Engineers, Local 150* v. *Flair Builders, Inc.*, 406 US 487, 491 (1972); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 US 574, 582 (1960). Thus, neither the Company nor the Union could be compelled to arbitrate the severance pay grievance because, at the time the grievance arose, they were not subject to an agreement to arbitrate and "[n]o obligation to arbitrate a labor dispute arises solely by operation of law." *Gateway Coal Co.* v. *United Mine Workers*, 414 US 368, 374 (1974).

II. Federal Labor Policy Prohibits a Court From Imposing Compulsory Arbitration on Labor or Management Where the Parties Are Not Bound by an Agreement to Arbitrate

Commencing with the National Labor Relations Act (29 USC §151 et seq.)—the nation's principal labor law—federal labor policy as established by Congress has been designed to insure "that employees as a group could express their opinions and exert their combined influence over the terms and conditions of their employment" through bargaining. *H. K. Porter Co., Inc.* v. *NLRB*, 397 US 99, 103 (1970). The Labor Act prohibits both labor and management from refusing to bargain in good faith where the bargaining obligation exists.[4] And arbitration is "a part of the continuing collective bargaining process." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 US 574, 581 (1960).

But, one of the "fundamental policies" in this system of industrial self-government is "freedom of contract" and neither the Labor Board nor a court can either compel the parties to reach agreement on any issue or rewrite the parties' agreement to impose additional or other undertakings besides those agreed to by the parties. 29 USC §158(d);[5] *H. K. Porter, Inc.*

4. 29 USC §§158(a)(5) and 158(b)(3).

5. In relevant part 29 USC §158(d) provides: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating

v. *NLRB, supra*, 397 US at 108-109. It follows that under our system of industrial democracy which compels collective bargaining where the employees desire to bargain collectively, "whether or not the company was bound to arbitrate . . . is a matter to be determined . . . on the basis of the contract entered into by the parties." *Atkinson* v. *Sinclair Refining Co.*, 370 US 238, 241 (1962). Even though, as a matter of law, the parties may be required to bargain collectively, the parties' duty to arbitrate cannot be extended beyond their contractual undertaking to arbitrate because the contract—not the law—forms the "basis" for the undertaking. In light of this clear federal labor policy which requires bargaining but which strictly prohibits the imposition of terms of agreement on the parties, the Labor Board has rejected the argument that a party who was at one time subject to an agreement to arbitrate could be compelled to arbitrate disputes arising after the agreement to arbitrate expired:

> "The mutual commitment of contract parties to consider interstitial disputes through a grievance procedure and, failing agreement, to submit them to binding arbitration is a voluntary surrender of the right of final decision which Congress has reserved to these parties. Indeed, each such agreement is a vindication of Congress' judgment: the parties have not only bargained to agreement, they have undertaken to continue to 'bargain' (in the

(Footnote Continued)

any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."

sense of meeting at reasonable times and seeking agreement in good faith) about the application of their agreement to the facts of their particular relationship. They have further agreed, where arbitration has been accepted, voluntarily and mutually to surrender the use of their respective economic weapons in favor of third party determination of unresolved issues. The consequent reduction of industrial strife is widely celebrated and has led to a declared national policy encouraging arbitration. Section 203(d), Labor Management Relations Act, 29 U.S.C., Section 173(d); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 US 574 (1960). But we must not be induced by that policy or its benefits to overlook that aribtration is, at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize. Absent mutual consent, the parties revert to the statutory scheme of 'free' collective bargaining, wherein each party must attempt in good faith to reach agreement, but is under no statutory mandate to reach agreement or to forfeit its right to utilize its economic power if no agreement can be achieved.

"The courts have repeatedly recognized this concept. [citations omitted]

* * *

"Applying these principles to the hiatus which sometimes exists—and existed here—between the expiration of one agreement and the reaching of a new one, it follows that employers and unions must continue to meet and confer and to seek agreement in good faith, not only over the terms and conditions of a proposed new agreement, but also over

employee grievances which may arise during such hiatus. But it does not follow that during such period the law requires the parties to submit to arbitration any grievance which they are unable to resolve." *Hilton Davis Chemical Company*, 185 NLRB 241, 242 (1970).

From the Congressional mandate and the opinions of this Court, the Labor Board correctly concluded that no policy of the nation's labor laws would be served by compelling labor or management to arbitrate disputes where, as here, one of the parties had terminated and cancelled the agreement to arbitrate.[6]

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6. The result reached by the Labor Board follows logically from the nature of the duties arising from the collective bargaining relationship. Under the Labor Act, a newly certified labor organization which engages in collective bargaining with the employer of the employees which it represents cannot compel that employer to arbitrate any dispute arising between the parties prior to an agreement between labor and management that certain disputes will be arbitrated. Due to the operation of law and absent the union's agreement, the employer cannot change the terms and conditions of employment of its represented employees without first negotiating to an impasse with the union about such changes. However, there is no duty to arbitrate changes in conditions, challenged management action, individual grievances or any other complaint unless and until the employer is bound by an agreement to arbitrate. The effect of the Fourth Circuit's opinion in the instant case is that once labor or management has contractually agreed to arbitrate but the agreement to arbitrate expires, either party is in a different position than it was in prior to any agreement to arbitrate. Yet, the controlling fact in either circumstance is that there is no agreement to arbitrate and absent that agreement, the parties are left free to take whatever lawful action they can to compel the other side to concede to their positions or demands. Other obligations also expire at the ending of the contract. See *Sargent-Welch Scientific Co.*, 208 NLRB 811, 815 (1974). Recognizing that the duty to arbitrate is solely a creature of contract (i.e., cannot arise without a binding contract requiring arbitration), the Labor Board in *Hilton Davis Chemical Company* correctly ruled that once the agreement to arbitrate has expired, the duty to arbitrate also expires, notwithstanding the fact that by operation of law—not contract—the collective bargaining process continues, just as in the period prior to the execution of the initial arbitration agreement.

"By looking at the policy of [federal] legislation", this Court has formulated federal labor policy in those areas lacking "express statutory sanctions" (*Textile Workers* v. *Lincoln Mills*, 353 US 448, 457 [1957]) and, at times, has relied upon the Labor Board's judgment regarding issues before the Court in Section 301 (29 USC §185) cases, which issues also arise under the Labor Act. *E.g.*, *Howard Johnson Company* v. *Detroit Joint Board, Hotel & Restaurant Employees*, 417 US 249 (1974); *Local 174, Teamsters* v. *Lucas Flour*, 369 US 95, 105 (1962). Indeed, this Court has held that it would be "plainly inconsistent" with *Lincoln Mills* to allow the "policies found controlling in an unfair labor practice context [to] . . . be disregarded by the courts in a suit under Section 301 and thus to permit the rights enjoyed by [a party] . . . to depend upon the forum in which the union presses its claims." *Howard Johnson Company* v. *Detroit Joint Board, Hotel & Restaurant Employees*, 417 US 249, 256 (1974). The Fourth Circuit's opinion in the instant case disregarded "the policies found controlling in an unfair labor practice context", by rejecting the teachings of *Hilton Davis Chemical Company* that in our system of free collective bargaining, a party cannot be compelled to arbitrate a dispute arising after the termination of its arbitration agreement.

The 1947 amendments (61 Stat. 136) to the Labor Act support the conclusion that arbitration cannot be compelled in the circumstances presented in this case. While Congress stated its preference for voluntary dispute resolution procedures agreed upon by the parties as "the desirable method for settlement of grievance disputes", Congress specifically qualified its preference to relate only to those disputes "arising

over the application or interpretation of an *existing* collective bargaining agreement." Labor Management Relations Act, §203(d) (1947), 29 USC §173(d) (Emphasis added)[7]. Congress' insertion of the word "existing" in Section 203(d) was apparently intended to reject any connotation that Congress believed compulsory arbitration of labor disputes to be consistent with or a part of federal labor policy. See, Sen. Rep. No. 105 on S 1126, 80th Cong., 1st Sess. p. 28, I Leg. History 434; 93 Cong. Rec. 3951-3952 (1947), II Leg. Hist. 1008 (remarks of Senator Taft). The preference for arbitration in some circumstances was never intended to be an inroad on the Congressional mandate establishing our system of industrial democracy wherein labor and management are free to exert their economic strength against each other unless there is a binding agreement to the contrary between them. Thus, the Fourth Circuit misreads federal labor legislation by stating that the "most basic policy" of federal labor law is the preference for arbitration. As demonstrated by the opinions of this Court under that legislation, federal labor policy is designed, first, to allow a bargaining relationship to exist where a majority of employees in an appropriate bargaining unit so desire; second, to allow the parties to reach a contract through free collective bargaining involving lawful economic action by either party; and, third, to insure that the parties can be compelled to abide by that contract during its term. *H. K. Porter Co., Inc.* v. *NLRB*, *supra*; *Textile Workers* v. *Lincoln Mills*, *supra*, 353

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7. As this Court stated in *Steelworkers* v. *American Manufacturing Company*, *supra*, 363 US at 567:

> "Arbitration is a stabilizing influence only as it serves as the vehicle for handling any and all disputes that *arise under* the agreement." (Emphasis added)

US at 453. Notwithstanding its preference for arbitration as the means to settle labor controversy where arbitration is agreed to in an "existing" labor contract, Congress has never required, and this Court has never found any labor policy to compel the parties to arbitrate any dispute they have not consented to arbitrate when the dispute arises.

In light of express Congressional policy, the opinions of this Court and the rulings of the Labor Board, it is not surprising that the Courts of Appeal have understood that federal labor policy does not require an employer to arbitrate grievances arising after the expiration of the labor contract. *Local 58, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO* v. *Sun Products Corporation*, 521 F 2d 1286 (6 Cir., 1975) and *IAM Local Lodge 2369* v. *Oxco Brush Division*, 517 F 2d 239 (6 Cir., 1975) held that an employer is not required to arbitrate a dispute concerning "accrued" vacation pay where the dispute arises after the labor contract terminated and after the employer permanently ceased operations. In *OCAW International Union* v. *American Maize Products Company*, 492 F 2d 409, 412 (7 Cir.), *cert. denied*, 417 US 969 (1974), the court rejected an attempt by a union to compel the employer to arbitrate either the propriety of the employer's lockout of whether the employer could hire temporary replacements during the lockout.[8] The Seventh Circuit correctly ruled that the

8. Similarly, in *Flight Engineers Int'l Assoc., EAL Chapter* v. *Eastern Air Lines, Inc.*, 359 F 2d 303, 309 (2 Cir., 1966), the court refused to compel an employer subject to the Railway Labor Act to submit to a system board of adjustment (which the court noted was comparable to an arbitration panel) a dispute concerning the temporary replacement of strikers arising after the termination of the parties' contract. *See Local 1251, UAW* v. *Robertshaw Controls Co.*, 405 F 2d 29 (2 Cir., 1968); *Procter & Gamble Ind. U.* v.

nature of the grievance did not control the duty to arbitrate and that once the agreement to arbitrate was terminated, the employer could not be compelled to arbitrate disputes arising thereafter. And the District of Columbia Circuit affirmed a District Court judgment that:

> "Since the collective bargaining agreement between plaintiff and defendant had terminated prior to the time defendant went out of business, no dispute regarding severance pay could arise under the contract and as a matter of Law there could be nothing to arbitrate." *Milk Drivers Local No. 246* v. *Thompson's Dairy, Inc.*, 80 LRRM 3403, 3404 (DDC, 1972), *aff'd mem.* 489 F 2d 1272, 85 LRRM 2405 (DC Cir., 1974).

III. The Fourth Circuit's Opinion and Order Is Clearly Inconsistent With National Labor Policy

The Fourth Circuit concedes that at least "individual employee grievances" or "disputes involving non-accruable rights" which arise after the expiration of the labor contract are not arbitrable because the arbitration agreement is terminated at that time. Yet, the Court decided that the Union's severance pay grievance should be arbitrated even though it arose after the contract was terminated. (P.A. 12) The Court points to nothing in either federal labor policy or in the parties' terminated arbitration agreement (which it is supposedly enforcing) upon which to base its decision that after the

(Footnote Continued)

Procter & Gamble Mfg. Company, 312 F 2d 181 (2 Cir., 1962), *cert. denied*, 374 US 830 (1963). *Ward Foods, Inc.* v. *Local 50, B&CW*, 360 F Supp 1310 (SD NY, 1973) (relying on *Flight Engineers Int'l Assoc.* v. *Eastern Air Lines, Inc., supra*, to hold that an employer could not be compelled to arbitrate a claim for severance pay arising after the termination of the labor contract.).

contract expired some grievances are arbitrable but others are not arbitrable.

The labor contract provided that "all grievances" would be submitted to arbitration but the Court said that as a matter of law at certain times only some grievances would be submitted to arbitration. The labor contract provided that either party could terminate or cancel the contract but the Fourth Circuit ruled that the agreement to arbitrate some (but not all) grievances would be extended in perpetuity regardless of the termination or cancellation of the contract. In essence, what the Fourth Circuit has done is to rewrite the parties' agreement to change its express scope and duration.

If the parties had desired to continue their contract in effect or continue the duty to arbitrate perpetually as to all or some issues, they could have easily accomplished this by so stating in their agreement. But in this case nothing in the labor contract even suggests that the parties agreed to arbitrate disputes over events occurring after the contract expired. Only by judicially rewriting the parties' arbitration agreement could the Fourth Circuit find that their duty to arbitrate extended to disputes arising after one of the parties terminated the contract.

This Court has held that the extent of the obligation to arbitrate must be determined upon "the contract entered into by the parties" (*Atkinson* v. *Sinclair Refining Co., supra,* 370 US at 241); the Fourth Circuit instead based its determination upon its characterization of the nature of the right claimed ("accruable" P.A. 9, 12-13) and its characterization of the nature of the dispute involved (regarding the "intent of the parties" [P.A. 5, 13]). While the Fourth Circuit concluded

the "best way" to resolve the severance pay grievance was in arbitration, the Fourth Circuit should have determined whether "the parties were subject to an agreement to arbitrate." *Operating Engineers, Local 150* v. *Flair Builders, Inc., supra,* 406 US at 491. Absent the parties' mutual and binding agreement to arbitrate, there was no duty to arbitrate, regardless of the Court of Appeals' belief as to the preferred way to resolve the dispute.

The Fourth Circuit's opinion relied upon *John Wiley & Sons* v. *Livingston,* 376 US 543 (1964), and *Piano and Musical Instrument Workers Union* v. *W. W. Kimball Company,* 379 US 357 (1964). But nothing in those decisions supports the radical idea that parties can be compelled to arbitrate disputes where they are not bound by an arbitration agreement. In fact, in *Wiley,* this Court underscored the very point that:

> "[J]ust as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori,* it cannot be compelled to arbitrate if an arbitration clause does not bind it at all." *John Wiley & Sons* v. *Livingston, supra,* 376 US at 547.

This is a clear and forceful statement that the duty to arbitrate cannot arise unless there exists a binding arbitration clause at the time the dispute arises.

Moreover, the question in *Wiley*—which was the Court's "first experience with the difficult 'successorship' question"[9] (an issue not at all involved in this case)—was whether Wiley could be considered bound by the predecessor's agreement to arbitrate; *Wiley*

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9. *Howard Johnson Company* v. *Detroit Joint Board, Hotel & Restaurant Employees, supra,* 417 US at 254.

assumes that there had to be an agreement to arbitrate before there could be a duty to arbitrate. The whole point of the union's argument in *Wiley* was to demonstrate that the entity which had survived the merger was bound by the existing labor contract and, therefore, had to arbitrate the grievances. In both *Wiley* and *Howard Johnson*, this Court reaffirmed its position that there would be no duty to arbitrate unless there was an "express or implied assumption of the agreement to arbitrate." *Howard Johnson Company* v. *Detroit Joint Board, Hotel & Restaurant Employees*, *supra*, 417 US at 264. In *Wiley*, the successor's assumption of the agreement to arbitrate resulted from the state law regulating mergers of entities in that state. Thus, as a matter of law, the surviving entity became a party to an agreement to arbitrate which was in existence when the arbitrable disputes arose; if the state law had not made Wiley an effective party to the arbitration agreement, then the duty to arbitrate would not have arisen because otherwise Wiley was not a party to an agreement to arbitrate.

This Court's *per curiam* opinion in *Piano Workers* does not support the Fourth Circuit's statement that *Piano Workers* is a case in which arbitration was compelled where there was no existing arbitration agreement at the time the grievance arose. (P.A. 9) In *Piano Workers*, the Seventh Circuit had held that the employer did not have to arbitrate certain grievances because, first, the record before the Court failed to demonstrate "that defendant during the term of the agreement in any way violated the seniority rights of its employees"; and, second, "during the term of the agreement there was never any *difference* between the parties to this case in regard to seniority rights as to

employment at French Lick. . . ." *Piano and Musical Instrument Workers Union* v. *W. W. Kimball Co.*, 333 F 2d 761, 765 (7 Cir. 1964). The labor contract stated that the parties would arbitrate "differences" which "cannot be settled directly by the parties concerned" at the earlier steps in the grievance procedure. *Id.* at 762. The Court of Appeals concluded that while the union and the company had discussed "the rights of employees to be employed at the French Lick plant," a specific discussion of "seniority status" had not occurred and, therefore, the dispute was not arbitrable because the precondition to arbitration had not been satisfied during the term of the contract.

In its *per curiam* reversal of the Seventh Circuit's *Piano Workers* decision, the Supreme Court cited two cases: *Steelworkers* v. *American Manufacturing Co.* and *John Wiley & Sons, Inc.* v. *Livingston*. The Company submits that the Court's citation of these cases demonstrates that the *Piano Workers* case is inapposite to the case at bar. *American Manufacturing Co.* was cited by the Supreme Court to demonstrate that the Seventh Circuit's holding that there had been no violation of the labor contract was improper because in *American Manufacturing Co.*, the Supreme Court had stated that the "courts . . . have no business weighing the merits of the grievance." *Steelworkers* v. *American Manufacturing Co.*, *supra*, 363 US at 568. In *Piano Workers*, the Court cited *Wiley* because in *Wiley* the Supreme Court held that whether procedural preconditions to arbitration had been satisfied was an issue to be decided by the arbitrator; the Seventh Circuit's finding that the "difference" concerning the reemployment rights of the employees had not been processed through earlier steps in the grievance procedure before

the demand for arbitration (thus precluding arbitration) was an invasion of the province of the arbitrator, contrary to the ruling in *Wiley* that the issue as to whether procedural preconditions to arbitration were satisfied was an issue to be decided by the arbitrator.[10]

In *Piano Workers* and in *Wiley*, there was never any question that the initial and fundamental disputes arose during the terms of the contracts because of actions taken by the companies during the term of the labor contract.[11] In the instant case, the Union does not contest that the events giving rise to the grievance all occurred after the Union had exercised

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10. Wiley argued "that since Steps 1 and 2 have not been followed, and since the duty to arbitrate arises only in Step 3, it has no duty to arbitrate this dispute." *John Wiley & Sons, Inc.* v. *Livingston, supra*, 376 US at 556. The Seventh Circuit in *Piano Workers* erroneously accepted a similar argument while this Court had stated that such issues were to be decided by an arbitrator.

11. The union petitioned for a writ of certiorari to review the Seventh Circuit's opinion in *Piano Workers* and in the petition the union stated the issue as follows:

> "Must not a court direct arbitration of the question of reemployment rights of employees under a collective bargaining agreement which provides for arbitration of any 'difference' and which requires laid off employees to be reemployed within two years of layoff, where the company transferred the location of its plant, laid off and did not recall its employees, considered new job applicants at the relocated plant—*all during the term of the contract*—but did not resume actual production with the new employees at its new location until nine days following the contract's expiration." *Piano and Musical Instrument Workers Union* v. *W. W. Kimball Co.*, 239 F Supp 523, 524 (ND Ill, 1965). (Emphasis added)

In other words, the issue before the Court on the petition demonstrated that the facts underlying the grievance arose prior to the contract—regardless of what the Seventh Circuit felt about the scope of the parties' pre-arbitration grievance meetings. The Sixth Circuit correctly noted that the dispute in *Piano Workers* arose before the expiration of the contract. *IAM Local Lodge 2369* v. *Oxco Brush Division, supra*, 517 F 2d at 243.

its right to terminate and cancel the collective bargaining agreement, including the arbitration provisions therein. Thus, neither *Piano Workers* nor *Wiley* constitutes an exception to the existing, fundamental principle stated in *Wiley* that a party "cannot be compelled to arbitrate if an arbitration clause does not bind it at all." *John Wiley & Sons* v. *Livingston, supra*, 376 US at 547.

CONCLUSION

The order of the Court of Appeals should be reversed and the case should be remanded with instructions to reinstate the judgment of the District Court (A. 46).

Respectfully submitted,

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